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8
9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA
11 SAN FRANCISCO DIVISION
12

13 VNUS MEDICAL TECHNOLOGIES, INC.,

14 Plaintiff,

15 v.

16 BIOLITEC, INC., DORNIER MEDTECH
17 AMERICA, INC., and NEW STAR LASERS,
18 INC. d/b/a COOLTOUCH, INC., DAVID S.
CENTANNI, and TYRELL L. SCHIEK.

19 Defendants.

20 NEW STAR LASERS, INC. d/b/a
21 COOLTOUCH, INC.,

22 Counterclaimant,

23 v.

24 VNUS MEDICAL TECHNOLOGIES, INC.,

25 Counterdefendant.
26
27
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Case No. C08-03129-JCS

**NEW STAR LASERS, INC.'S D/B/A
COOLTOUCH, INC. ANSWER TO
FIRST AMENDED COMPLAINT
FOR PATENT INFRINGEMENT AND
COUNTERCLAIMS**

DEMAND FOR JURY TRIAL

Complaint Filed: July 10, 2008

1 Defendant, New Star Lasers, Inc. d/b/a CoolTouch, Inc., (“CoolTouch”), by counsel,
2 alleges as follows in answer and as counterclaims in response to the First Amended Complaint
3 (“Complaint”) filed by VNUS Medical Technologies, Inc. (“VNUS”):

4 **JURISDICTION AND VENUE**

- 5 1. CoolTouch admits the allegations of paragraph 1 of the Complaint.
- 6 2. CoolTouch admits the allegations of paragraph 2 of the Complaint.
- 7 3. CoolTouch admits the allegations of paragraph 3 of the Complaint only inso far as
8 those allegations concern CoolTouch. As to the allegations with regard to the remaining
9 defendants, CoolTouch is without information or belief sufficient to respond to such allegations
10 and therefore denies the remaining allegations.
- 11 4. Insofar as the allegations of paragraph 4 of the Complaint are directed to
12 CoolTouch, CoolTouch admits those allegations but, on information and belief, denies those
13 allegations with regard to the remaining defendants.
- 14 5. CoolTouch admits the allegation of paragraph 5 of the Complaint.
- 15 6. CoolTouch is without sufficient information and belief to answer the allegations of
16 paragraph 6 of the Complaint.
- 17 7. CoolTouch is without sufficient information and belief to answer the allegations of
18 paragraph 7 of the Complaint.
- 19 8. CoolTouch is without sufficient information and belief to answer the allegations of
20 paragraph 8 of the Complaint.
- 21 9. CoolTouch is without sufficient information and belief to answer the allegations of
22 paragraph 9 of the Complaint.
- 23 10. CoolTouch is without sufficient information and belief to answer the allegations of
24 paragraph 10 of the Complaint.
- 25 11. CoolTouch is without sufficient information and belief to answer the allegations of
26 paragraph 10 of the Complaint.
- 27
- 28

THE PATENTS

12. CoolTouch is without sufficient information and belief to answer the allegations of paragraph 12 of the Complaint and therefore denies those allegations.

13. CoolTouch is without sufficient information and belief to answer the allegations of paragraph 13 of the Complaint and therefore denies those allegations.

14. CoolTouch is without sufficient information and belief to answer the allegations of paragraph 14 of the Complaint and therefore denies those allegations.

15. CoolTouch is without sufficient information and belief to answer the allegations of paragraph 15 of the Complaint and therefore denies those allegations.

16. CoolTouch is without sufficient information and belief to answer the allegations of paragraph 16 of the Complaint and therefore denies those allegations.

17. CoolTouch denies the allegations of paragraph 17 of the Complaint .

18. CoolTouch denies the allegations of paragraph 18 of the Complaint .

AFFIRMATIVE DEFENSES

CoolTouch asserts the following affirmative and other defenses and reserves the right to amend its Answer as additional information becomes available.

FIRST AFFIRMATIVE DEFENSE

19. Plaintiff's Complaint fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

20. CoolTouch has not and is not infringing the 6,752,803 ("803 patent"); 6,769,433 ("433 patent"); 6,258,048 ("048 patent"); and 7,396,355 ("355 patent") patents.

THIRD AFFIRMATIVE DEFENSE

21. On information and belief, the '803, '433, '048 and '355 patents are invalid for failing to comply with one or more requirements of the patent laws of the United States, including, but not limited to, the conditions for patentability set forth in 35 U.S.C. §§ 101, 102, 103 and 112.

FOURTH AFFIRMATIVE DEFENSE

22. Plaintiff is estopped by representations or actions taken during the prosecution of the '803, '433, '048 and '355 patents which limits the scope of the claims of those patents under the doctrine of prosecution history estoppel.

FIFTH AFFIRMATIVE DEFENSE

23. On information and belief, Plaintiff's claim for damages, if any, is limited by 35 U.S.C. § 287.

COUNTERCLAIMS

Parties

1. Counterclaimant CoolTouch ("CoolTouch") is a corporation organized and existing under the laws of California and having a principal place of business at 9085 Foothills Blvd., Roseville, CA 95747.

2. Counterdefendant VNUS alleges that it is a Delaware corporation and having its principal place of business at 5799 Fontanoso Way, San Jose, CA 95138. VNUS alleges that it is the owner of all rights in the patents asserted by VNUS in this action.

FACTUAL BACKGROUND

3. CoolTouch incorporates by reference the allegations of paragraphs 1 and 2 of these counterclaims as though fully set forth herein.

4. By its Complaint, Counterdefendant VNUS ("VNUS") has alleged that it is the owner of U.S. Patent Nos. 6,752,803, ("803 patent"); 6,769,433 ("433 patent"); 6,258,048 ("048 patent"); and 7,396,355 ("355 patent"), that the '803, '433, '048 and '355 patents are valid and enforceable, and that CoolTouch has infringed the '803, '433, '048 and '355 patents by making, offering for sale, selling, and using certain products. CoolTouch denies that any of its products infringes or has infringed any claim of the '803, '433, '048 and '355 patents directly, indirectly, contributorily, or otherwise and contends that the '803, '433, '048 and '355 patents are invalid for failure to comply with the patent laws of the United States, including, without limitation, the provisions of 35 U.S.C. §§ 101, 102, 103 and 112. A justiciable controversy therefore exists between VNUS and CoolTouch and this Court has jurisdiction under 28 U.S.C.

1 §§ 1331, 1338(a) and 2201.

2 **FIRST COUNTERCLAIM**

3 5. CoolTouch incorporates by reference the allegations of paragraphs 1-4 of these as
4 though fully set forth herein.

5 6. CoolTouch has not infringed and is not infringing any valid and enforceable
6 claims of the '803, '433, '048 and '355 patents.

7 7. A judicial declaration is necessary and appropriate at this time so that CoolTouch
8 may ascertain its rights and duties with respect to the manufacture and sale of its products that
9 VNUS alleges infringe the '803, '433, '048 and '355 patents.

10 **SECOND COUNTERCLAIM**

11 8. CoolTouch incorporates by reference the allegations of paragraphs 1-7 of these
12 counterclaims as though fully set forth herein.

13 9. The claims of the '803, '433, '048 and '355 patents are invalid for failing to
14 comply with one or more requirements of the patent laws of the United States, including, but not
15 limited to, the conditions for patentability set forth in 35 U.S.C. §§ 101, 102, 103 and 112.

16 10. A judicial declaration is necessary and appropriate at this time so that CoolTouch
17 may ascertain its rights and duties with respect to the manufacture and sale of its products that
18 VNUS alleges infringe the '803, '433, '048 and '355 patents.

19 **EXCEPTIONAL CASE**

20 11. This is an exceptional case entitling CoolTouch to an award of its attorneys' fees
21 and expenses incurred in connection with defending and prosecuting this action pursuant to 35
22 U.S.C. § 285.

23 **PRAYER FOR RELIEF**

24 WHEREFORE, CoolTouch prays for judgment as follows:

- 25 A. VNUS take nothing from its complaint;
26 B. VNUS' Complaint be dismissed with prejudice;
27 C. A declaratory judgment that CoolTouch has not infringed and does not infringe,
28 directly or indirectly, any claims of the '803, '433, '048 and '355 patents, either literally or under

1 the doctrine of equivalents, willfully or otherwise;

2 D. A declaratory judgment be entered adjudging that the '803, '433, '048 and '355
3 patents are invalid;

4 E. A declaration that VNUS' claims are limited and/or barred in whole or in part by
5 the provisions of 35 U.S.C. § 287;

6 F. A denial of VNUS' request for damages and injunctive relief;

7 G. A declaratory judgment that this case is exceptional pursuant to 35 U.S.C. § 285,
8 granting an award of costs and reasonable attorney fees incurred in connection with this action;
9 and

10 H. The grant to CoolTouch of any further equitable or legal relief as the Court deems
11 just and proper.

12
13 Dated: August 6, 2008

Respectfully submitted,

14 ORRICK, HERRINGTON & SUTCLIFFE LLP

15
16 By /James W. Geriak

17 JAMES W. GERIAK
18 ALLAN W. JANSEN
19 MARK STIRRAT
20 Attorneys for Defendant
21 NEW STAR LASERS, INC.
22 d/b/a COOLTOUCH, INC.
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CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that on August 6, 2008, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send electronic notification of such filing to the following individual(s):

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on August 6, 2008, at Irvine, California.

s/James W. Geriak
James W. Geriak